

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

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11 GODSON ERUCHALU,

12 Plaintiff,

13 v.

14 U.S. BANK, NATIONAL ASSOCIATION;  
15 U.S. BANK HOME MORTGAGE; U.S.  
16 BANK HOME MORT OUTSOURCING;  
17 NATIONAL DEFAULT SERVICING CORP;  
18 MERSCORP; TIFFANY & BOSCO PA;  
19 FIRST OPTION MORTGAGE,

Defendants.

Case No. 2:12-cv-01264-MMD-VCF

ORDER

(Def.'s Motion to Dismiss – dkt. no. 24;  
Plf's Motion to Supplement – dkt. no. 34)

20 **I. SUMMARY**

21 Before the Court is Defendant First Option Mortgage's ("First Option") Motion to  
22 Dismiss. (Dkt. no. 24.) Defendants U.S. Bank National Association, U.S. Bank Home  
23 Mortgage, U.S. Bank Home Mort Outsourcing (collectively "US Bank"), MERSCORP,  
24 National Default Servicing Corp ("NDSC"), and Tiffany & Bosco PA ("Tiffany Bosco")  
25 have filed joinders to the motion. (Dkt. nos. 26, 27.) The Court has also considered  
26 Plaintiff's opposition (dkt. no. 30), and First Option's reply (dkt. no. 32). Also before the  
27 Court is Plaintiff's Motion for Leave to File Supplemental Support. (Dkt. no. 34.) The  
28 Court has also considered Defendants' oppositions (dkt. no. 36), and Plaintiff's reply,

1 (dkt. no. 41). For the reasons discussed below, Defendants' Motion is granted in part  
2 and denied in part. As the Court considers Plaintiff's supplemental information, Plaintiff's  
3 motion is granted.

4 **II. BACKGROUND**

5 This case arises from Plaintiff's purchase of real property in Clark County,  
6 Nevada, and the subsequent non-judicial foreclosure proceedings. The Complaint  
7 alleges the following facts:

8 On or about August 27, 2010, Plaintiff executed a Deed of Trust and a Note for  
9 \$330,548.00. The Deed of Trust stated that First Option Mortgage was the Lender and  
10 Beneficiary and MERS was the nominee for the Beneficiary. The Deed of Trust was  
11 secured by the property located at 7730 North Jones Boulevard, Las Vegas, Nevada  
12 89131 (herein after "Property"). Immediately after the loan closed, Plaintiff's Note was  
13 securitized, pooled, and sold as a "stock." Plaintiff was never informed of any  
14 assignments. At some point thereafter, US Bank began servicing the Note. Plaintiff  
15 made requests to see the original "wet signature" Note, Deed of Trust, and subsequent  
16 assignments. Those requests were ignored or denied. The loan was foreclosed upon.

17 Plaintiff alleges that First Option and US Bank charged Plaintiff, an African  
18 American borrower, higher discretionary broker fees and retail loan markups than other  
19 non-African American borrowers. Plaintiff was allegedly charged higher interest rates on  
20 the basis of his race. First Option allegedly had knowledge of its mortgage loan officer's  
21 discriminatory acts but gave those same loan officers unguided discretion in loan pricing.  
22 Moreover, First Option allegedly shared the discriminatory overages with the mortgage  
23 loan officers and wholesale mortgage buyers.

24 Plaintiff also alleges that First Option should be held liable for the acts of its  
25 preferred appraisers, who allegedly over-appraised the Property. Additionally, Plaintiff  
26 alleges that First Option should be held liable for the acts of the title company for failure  
27 to discover and disclose encumbrances and defects on the Property relating to City  
28 Special District Zoning.

1           The Complaint alleges claims for (1-10) violations of the Truth in Lending Act  
 2 (“TILA”) and Regulation Z (“Reg Z”) propagated thereunder, (11) failure to comply with  
 3 the Fair Debt Collection Practices Act (“FDCPA”), (12) violations of the Real Estate  
 4 Settlement Procedures Act (“RESPA”), (13) slander of title/quiet title, (14) fraud and  
 5 misrepresentation/unfair trade practices, (15) discrimination under the Fair Housing Act  
 6 (“FHA”)/Equal Credit Opportunity Act (“ECOA”)/Title II of the Civil Rights Act of 1964  
 7 (“Title II”)/TILA, (16) negligent supervision, (17) defective title search, (18) fraudulent  
 8 appraisal, (19)<sup>1</sup> bad faith mediation, and (20) common law fraud/injurious falsehood.  
 9 (Dkt. no. 1.)

10           **III. DISCUSSION**

11           **A. Legal Standard**

12           On a 12(b)(6) motion, the court must determine “whether the complaint’s factual  
 13 allegations, together with all reasonable inferences, state a plausible claim for relief.”  
 14 *Cafasso, U.S. ex rel. v. Gen. Dynamics C4 Sys.*, 637 F.3d 1047, 1054 (9th Cir. 2011)  
 15 (*citing Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009)). “A claim has facial plausibility  
 16 when the plaintiff pleads factual content that allows the court to draw the reasonable  
 17 inference that the defendant is liable for the misconduct alleged.” *Iqbal*, 556 U.S. at 678  
 18 (*citing Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007)).

19           When determining the sufficiency of a claim, “[w]e accept factual allegations in the  
 20 complaint as true and construe the pleadings in the light most favorable to the non-  
 21 moving party[; however, this tenet does not apply to] . . . legal conclusions . . . cast in the  
 22 form of factual allegations.” *Fayer v. Vaughn*, 649 F.3d 1061, 1064 (9th Cir. 2011)  
 23 (citation and internal quotation marks omitted). “Therefore, conclusory allegations of law  
 24 and unwarranted inferences are insufficient to defeat a motion to dismiss.” *Id.* (citation  
 25 and internal quotation marks omitted); see also *Iqbal*, 556 U.S. at 678 (*quoting Twombly*,

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27           <sup>1</sup>The Complaint numbers both Counts 18 and 19 as Count 18. Therefore, this  
 28 Order renumbers each subsequent Count and refers to each by the correctly numbered  
 cause of action.

1 550 U.S. at 555) (“A pleading that offers ‘labels and conclusions’ or ‘a formulaic  
 2 recitation of the elements of a cause of action will not do.’”).

3 Mindful of the fact that the Supreme Court has “instructed the federal courts to  
 4 liberally construe the ‘inartful pleading’ of pro se litigants,” *Eldridge v. Block*, 832 F.2d  
 5 1132, 1137 (9th Cir. 1987), the Court will view Plaintiff’s pleadings with the appropriate  
 6 degree of leniency.

7 Normally, “a district court may not consider any material beyond the pleadings in  
 8 ruling on a Rule 12(b)(6) motion. . . . However, material which is properly submitted as  
 9 part of the complaint may be considered on a motion to dismiss.” *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1555 n. 19 (9th Cir. 1990) (citations  
 10 omitted). Similarly, “documents whose contents are alleged in a complaint and whose  
 11 authenticity no party questions, but which are not physically attached to the pleading,  
 12 may be considered in ruling on a Rule 12(b)(6) motion to dismiss” without converting the  
 13 motion to dismiss into a motion for summary judgment. *In re Silicon Graphics Inc. Sec. Litig.*, 183 F.3d 970, 986 (9th Cir. 2002). Otherwise, if the district court considers  
 14 materials outside of the pleadings, the motion to dismiss is converted into a motion for  
 15 summary judgment. See *Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 925  
 16 (9th Cir. 2001).

17 If the court grants a motion to dismiss, it must then decide whether to grant leave  
 18 to amend. The court should “freely give” leave to amend when there is no “undue delay,  
 19 bad faith[,] dilatory motive on the part of the movant, repeated failure to cure deficiencies  
 20 by amendments previously allowed, undue prejudice to the opposing party by virtue of . . .  
 21 . the amendment, [or] futility of the amendment.” Fed.R.Civ.P. 15(a); *Foman v. Davis*,  
 22 371 U.S. 178, 182 (1962). Generally, leave to amend is only denied when it is clear that  
 23 the deficiencies of the complaint cannot be cured by amendment. See *DeSoto v. Yellow  
 24 Freight Sys., Inc.*, 957 F.2d 655, 658 (9th Cir. 1992).

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1                   **B. Plaintiff's Violation of the Local Rule Governing Page Limits**

2                   As a preliminary matter, Defendants object to Plaintiff's briefs as they all exceed  
 3 the Local Rules' page limits. Specifically, Plaintiff's Opposition to Defendants' Motion to  
 4 Dismiss is 57 pages, excluding exhibits. Additionally, Plaintiff's Motion to Supplement his  
 5 Opposition to the Motion to Dismiss is 51 pages, excluding exhibits,<sup>2</sup> and the reply is 24  
 6 pages excluding exhibits. Plaintiff responds that NDSC and Tiffany Bosco's "last minute  
 7 joinder" compelled him to supplement the opposition to "provide the Court with this new  
 8 evidence."

9                   Local Rule 7-4 establishes a 30-page limit for motions and oppositions and a 20-  
 10 page limit for the reply brief, and requires prior authorization from the Court to exceed  
 11 such limits. Plaintiff has not sought or obtained the permission of this Court to exceed  
 12 these page limits before he filed his briefs. Although the Court is not obligated to  
 13 consider any arguments contained in the excess pages, the Court considers Plaintiff's  
 14 arguments in only this instance. The Court strongly cautions Plaintiff to comply with by  
 15 Court's Local Rules. Proceeding *pro se* does not give Plaintiff free license to disregard  
 16 this Court's rules of procedure.

17                   **C. Defendants' Motion to Dismiss**

18                   **1. Counts 1 & 4 – TILA Disclosures under 15 U.S.C. § 1635 and**  
 19 **Reg Z Cancellation under 12 C.F.R. § 226**

20                   15 U.S.C. § 1635 provides the right of rescission as to certain credit transactions.  
 21 However, the right of rescission does not apply to residential mortgage transactions. 15  
 22 U.S.C. § 1635(e)(1). A residential mortgage transaction "means a transaction in which a  
 23 mortgage, deed of trust, purchase money security interest arising under an installment  
 24 sales contract, or equivalent consensual security interest is created or retained against  
 25 the consumer's dwelling to finance the acquisition or initial construction of such

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26  
 27                   <sup>2</sup>As much of Plaintiff's arguments appear in the exhibits and many exhibits are  
 28 missing, the Court agrees with Defendants that Plaintiff's motion consists of 51 pages of  
 arguments with an additional 51 pages of attached exhibits.

1 dwelling.” 15 U.S.C. § 1602(x). Like TILA, Reg Z provides a right of rescission but the  
2 right does not apply to residential mortgage transactions. 12 C.F.R. § 226.23(f)(1).  
3 Therefore, any accompanying required notices would also not apply.

4       Here, Plaintiff's Complaint is premised on a residential mortgage transaction in  
5 that Plaintiff "executed a Fixed Rate Note and a Deed of Trust" whereby Plaintiff would  
6 pay monthly installments. (Compl. at ¶¶ 21-24.) As the remedy of rescission that Plaintiff  
7 seeks under Count 1 does not apply to residential mortgage transactions such as this,  
8 Plaintiff's claim fails as a matter of law. Count 4 similarly seeks rescission as a remedy  
9 because this claim is based on the allegation that "[t]here was no separate form to  
10 cancel, as required by [Reg Z]." Compl. at ¶ 155. Again, the remedy of rescission and  
11 accompanying required notices are not applicable to a residential mortgage transaction.

12        Thus, dismissal of these claims is proper because the Complaint does not allow  
13 the Court to draw a reasonable inference that the Defendants are liable for the alleged  
14 misconduct under any viable legal theory. In light of the cited precedent, dismissing  
15 these claims without prejudice would be improper because Plaintiff cannot amend his  
16 Complaint to allege facts sufficient to support these allegations. Therefore, Plaintiff's first  
17 and fourth claims are dismissed with prejudice.

- i. Counts 2, 3, 5, 6, 7, 8, 9, and 10 – Reg Z Disclosures, Rescission, Deceptive Grouping, Bad Faith Estimate, Consumer Statement, Other Disclosures, Calculation of Mortgage Balance, Itemization of Charges, Acceleration Statements

21 Any claim arising under TILA is limited by a one-year statute of limitations. 15  
22 U.S.C. § 1640(e); *King v. Cal.*, 784 F.2d 910, 915 (9th Cir. 1986) (explaining that the  
23 limitations period runs from the date of the transaction). The statute of limitations period  
24 begins to run upon execution of the contract because plaintiff possesses all information  
25 relevant to the discovery of any non-disclosures at the time the documents of the loan  
26 are signed. See *Meyer v. Ameriquest Mortg. Co.*, 342 F.3d 899, 902 (9th Cir. 2003).  
27 However, equitable tolling may, “in the appropriate circumstances, suspend the  
28 limitations period until the borrower discovers or had reasonable opportunity to discover

1 the fraud or nondisclosures that form the basis of the TILA action." *King*, 784 F.2d at  
2 915.

3 Here, the loan agreement in dispute was signed on August 27, 2010. This suit did  
4 not commence until July 17, 2012, nearly two (2) years after signing. Plaintiff has offered  
5 no facts or argument that he was unable to discover the fraud or nondisclosures at the  
6 time of the signing of the loan documents. Thus, Plaintiff's TILA claims are time-barred.  
7 However, the Court finds amendment would not be futile because Plaintiff could allege  
8 facts showing the equitable tolling doctrine should apply in this case.

9 Defendants ask the Court to dismiss these claims with prejudice arguing that the  
10 proffered documents show Plaintiff was given the documents he alleges he never  
11 received. The Court notes that Defendants have attached as exhibits several documents  
12 purported to be signed by Plaintiff acknowledging receipt of the documents Plaintiff  
13 alleges he was never given. However, the Court does not consider these documents  
14 either in ruling on the motion to dismiss or converting the motion to one for summary  
15 judgment. Specifically, the attached documents are not documents *whose contents* are  
16 alleged in the Complaint; rather, Plaintiff alleges he never received the documents at all.  
17 Moreover, even if the Court converted the motion to one for summary judgment, the  
18 Court could not consider the documents as they have not been authenticated pursuant  
19 to Federal Rules of Evidence 901 and 902.

20 Therefore, the Court dismisses these claims but gives Plaintiff leave to amend to  
21 allege facts showing the equitable tolling doctrine should apply.

22 **ii. Count 11 – FDCPA Violations**

23 Plaintiff's eleventh claim pursuant to the "Fair Debt Collection Act" alleges  
24 Defendants US Bank, First Option, NDSC, MERS, and Tiffany Bosco all "assisted in the  
25 filing of an unlawful foreclosure action" and "threatened to unlawfully repossess the  
26 plaintiff's property." (Compl. at ¶ 182-93). However, Plaintiff's claim fails as a matter of  
27 law because it is well established that "non judicial foreclosures are not an attempt to  
28 collect a debt under the Fair Debt Collection Practice Act and similar state statutes."

1 *Ellis v. World Sav. Bank, FSB*, No. 3:11-cv-0473-LRH-VPC, 2011 WL 6396568 \*2 (D.  
2 Nev. Dec. 20, 2011). Thus, dismissal of this claim is proper because the Complaint does  
3 not allow the Court to draw a reasonable inference that the Defendants are liable for the  
4 alleged misconduct under any viable legal theory. In light of the cited precedent,  
5 dismissing this claim without prejudice would be improper because Plaintiff cannot  
6 amend his Complaint to allege facts sufficient to support this allegation. Therefore,  
7 Plaintiff's eleventh claim is dismissed with prejudice.

### iii. Count 12 – RESPA Violations

9 Defendants seek dismissal of Count 12 by offering documents Plaintiff alleges he  
10 never received, namely the “notice of change of servicer.” However, as discussed above,  
11 the Court cannot and does not consider these documents for two reasons. First, in ruling  
12 on the motion to dismiss, the attached documents are not documents *whose contents*  
13 are alleged in the Complaint; thus, the Court cannot consider the documents under this  
14 standard. Second, in converting the motion to one for summary judgment, the Court  
15 cannot consider the documents as they have not been authenticated pursuant to Federal  
16 Rules of Evidence 901 and 902. Therefore, as to this claim, the motion to dismiss is  
17 denied.

iv. **Count 13 – Quiet Title/Slander of Title**

19 An action to quiet title is an equitable proceeding in which a party seeks to settle a  
20 dispute over ownership of property or to remove a cloud upon his title to the property.  
21 *MacDonald v. Krause*, 362 P.2d 724, 727 (Nev. 1961). A widely accepted rule in such  
22 actions is that the party must tender the undisputed amount due and owed to challenge  
23 the validity of the sale. See, e.g., *Abdallah v. United Savings Bank*, 43 Cal.App. 4th  
24 1101, 1109 (Cal.Ct.App. 1996). In essence, he who seeks equity must do equity. See  
25 *McQuiddy v. Ware*, 87 U.S. 14, 19 (1873). To state a slander of title claim under Nevada  
26 law, a plaintiff must allege “false and malicious communications, disparaging to [his] title  
27 in land, and causing special damage.” See *Exec. Mgmt., Ltd. v. Ticor Title Ins. Co.*, 963  
28 P.2d 465, 478 (Nev. 1998).

1 Here, Plaintiff has admitted the “loan went into default.” (Compl. at ¶ 48.)  
2 Plaintiff’s slander of title or quiet title claim is premised on the theory that each  
3 assignment was invalid and, thus, Defendants had no legal right to record any  
4 documents because Defendants had no interest in the Property. The “falsity” Plaintiff  
5 complains of is that the representations that “claim an interest in the property” were  
6 false. However, this claim relies on legal theories rejected by this Court and the Ninth  
7 Circuit, namely “split the note,” “extinguished note,” “securitization voids the deed of  
8 trust,” and “sham beneficiary” theories. See e.g. *Cervantes v. Countrywide Home*  
9 *Loans, Inc.*, 656 F.3d 1034, 1044 (9th Cir. 2011) (split the note); *Dyson Fourness v.*  
10 *Mortgage Elec. Registration Sys., Inc.*, No. 3-10-cv-40-ECR-RAM, 2010 WL 5071049 (D.  
11 Nev., Dec. 6, 2010) (extinguish the note); *Chavez v. Cal. Reconveyance Co.*, No. 2:10-  
12 cv-00325-RLH-LRL, 2010 WL 2545006 (D. Nev. June 18, 2010) (securitization voids the  
13 deed of trust); *Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d 1034, 1043–1044,  
14 1047 (9th Cir. 2011)(sham beneficiary). Plaintiff’s theory that insurance or tax credits,  
15 federal bailout funds, or other monies paid by investors somehow extinguished his  
16 mortgage obligation is patently incorrect. Thus, these claims fail as a matter of law and it  
17 is absolutely clear that the deficiencies cannot be cured by amendment. Plaintiff may not  
18 amend this claim.

v. **Count 14 – Unfair Trade Practices under NRS Chapter 598A<sup>3</sup>**

21 Chapter § 598A does not relate to real property or recordation of documents  
22 associated with real property. § 598A relates to antitrust and restraints on trade, neither  
23 of which are at issue here. NRS 598A.030-060 inclusive. Therefore, 598A does not

24 | //

provide an avenue of relief to Plaintiff. Amendment cannot cure the claim as it fails as a matter of law. Therefore, this claim is dismissed with prejudice.

vi. **Count 15 – Discrimination under the FHA, ECOA, Title II/TILA**

Defendants seek to dismiss this claim for discrimination arguing that it "is nearly incomprehensible" and does not distinguish between Defendants. Defendants' argument is solely that Defendants are not sufficiently on notice of the allegations to respond. However, earlier in Plaintiff's Complaint, Plaintiff specifically alleges that First Option and US Bank participated in the alleged discriminatory acts. (Compl. at ¶¶ 104-15.)

Therefore, the Court finds that this claim specifically identifies US Bank and First Option as the alleged perpetrators of the discrimination, and denies the motion to dismiss as to US Bank and First Option. However, as Plaintiff's Complaint makes no allegations as to MERSCORP, NDSC, and Tiffany Bosco respecting this claim, the claim is dismissed as to MERSCORP, NDSC, and Tiffany Bosco.

vii. Counts 16 and 20 – Negligent Supervision and Common Law Fraud/Injurious Falsehood

Defendants seek to dismiss claim 16 for negligent supervision arguing that it is, in fact, a claim for fraud because it alleges “Defendants’ use of deceit or trickery.” To that end, Defendants argue the claim does not comport with Rule 9(b)’s heightened pleading standard. Defendants raise the same arguments for claim 20 for common law fraud.

“Complaints alleging fraud must comply with both [Federal Rules of Civil Procedure] 8(a) and 9(b).” *Wagh v. Metris Direct, Inc.*, 363 F.3d 821, 828 (9th Cir. 2003), overruled on other grounds by *Odom v. Microsoft Corp.*, 486 F.3d 541, 551 (9th Cir. 2007) (en banc)). Claims of fraud must, in addition to pleading plausible allegations, also plead these allegations with particularity. *Cafasso, U.S. ex rel. v. General Dynamics C4 Systems, Inc.*, 637 F.3d 1047, 1056 (9th Cir. 2011). Under Federal Rule of Civil Procedure 9(b), “[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud.” This rule requires that claims of fraud be accompanied

1 by the “who, what, when, where, and how” of the conduct charged, *Vess v. CibaGeigy*  
2 Corp., USA, 317 F.3d 1097, 1106 (9th Cir. 2003) (*quoting Cooper v. Pickett*, 137 F.3d  
3 616, 627 (9th Cir. 1997)), so that the complaint does not simply “lump multiple  
4 defendants together.” *Destfino v. Reiswig*, 630 F.3d 952, 958 (9th Cir. 2011). This  
5 requirement ensures that the defendants are on “notice of the particular misconduct . . .  
6 so that they can defend against the charge and not just deny that they have done  
7 anything wrong.” *Vess*, 317 F.3d at 1106.

8        As to Claim 16, the Complaint attempts to impose liability on individual defendants  
9 for the allegedly fraudulent acts of their employees and agents. However, as to both  
10 Claims 16 and 20, the Complaint does not adequately plead a claim for fraud under the  
11 heightened pleading standard. Specifically, the Complaint does not give an account of  
12 the time, place, or identity of the party making the representation. Additionally, Plaintiff  
13 lumps all Defendants together and does not give Defendants any meaningful opportunity  
14 to refute or defend against the claims. The Complaint lacks specific references regarding  
15 which Defendants were involved in the misrepresentation, what they knew, where the  
16 alleged collusion took place, or any other information that would allow Defendants to  
17 defend against the allegations.

18 Therefore, the Court dismisses these claims but gives Plaintiff leave to amend to  
19 allege additional facts that specify the time, place, and identity of the party making the  
20 representations and specific references regarding which Defendants were involved in  
21 the representations or deceitful acts.

viii. Counts 17 and 18 – Defective Title Search and Fraudulent Appraisal

24 In claims 17 and 18 for defective title search and fraudulent appraisal, Plaintiff  
25 seeks to impose liability on Defendants for “the negligence of their preferred Title  
26 company” (Compl. at ¶ 235), and “the negligence of an independent appraiser when the  
27 lender adopts the appraiser’s opinion as its own or when the relationship between the  
28 lender and appraiser justifies holding the lender liable.” (Compl. at ¶ 240.) However,

1 Nevada law imposes liability under a theory of respondeat superior “only when the  
 2 employee is under the control of the employer and when the act is within the scope of  
 3 employment.” *Rockwell v. Sun Harbor Budget Suites*, 925 P.2d 1175, 1179 (Nev. 1996).  
 4 Here, Plaintiff has not alleged any agency relationship showing that the title company or  
 5 appraisers were under the control of the lender, or that the alleged negligent acts were  
 6 within the scope of the relationship. Absent these allegations, Plaintiff has failed to state  
 7 a claim upon which relief may be granted. The Court dismisses these claims but gives  
 8 Plaintiff leave to amend to allege additional facts that signify a legal agency relationship,  
 9 assent to the relationship, control over the agent, and the scope of the relationship.

10 **ix. Count 19 – Bad Faith Mediation**

11 Defendants seek to dismiss claim 19 because it does not identify who was  
 12 responsible for the alleged gross misconduct. Defendants are correct in that the  
 13 Complaint alleges that some Defendants “failed to show during a hearing to show cause”  
 14 pursuant to Nevada Foreclosure Mediation Rules, and that “Defendant appeared at the  
 15 mediation with no documents.” (Compl. at ¶¶ 244-46.) The Complaint does not  
 16 adequately distinguish between which defendants did what.<sup>4</sup> Therefore, this claim is  
 17 dismissed with leave to amend to identify which Defendant committed the alleged acts of  
 18 misconduct specifically.

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 26     <sup>4</sup>Plaintiff attempts to cure this deficiency in his opposition to the motion to dismiss  
 27 by arguing that First Option was not present at the mediation and that US Bank sent a  
 28 representative who conducted bad faith mediation. (Dkt. no. 30 at 24.) However,  
 allegations in an opposition brief cannot cure an otherwise deficient Complaint.

1     **IV. CONCLUSION**

2           IT IS THEREFORE ORDERED that Plaintiff's Motion to Supplement (dkt. no. 34)  
3 is GRANTED.

4           IT IS FURTHER ORDERED that Defendant First Option Mortgage's Motion to  
5 Dismiss (dkt. no. 24) is GRANTED in part and DENIED in part, as follows:

6           (1) GRANTED as to Claims 1, 4, 11, 13, and 14, which are dismissed with  
7 prejudice. Plaintiff may not amend these claims.

8           (2) GRANTED as to Claims 2, 3, 5, 6, 7, 8, 9, 10, 15 as to MERSCORP, NDSC,  
9 and Tiffany Bosco, 16, 17, 18, 19, and 20 are dismissed with leave to amend. Plaintiff  
10 must submit an amended complaint within fourteen (14) days of this order. Failure to  
11 submit an amended complaint by this deadline will result in dismissal of these claims  
12 with prejudice.

13           (3) DENIED as to claim 12 relating to all Defendants and claim 15 relating to US  
14 Bank and First Option.

15           DATED THIS 6<sup>th</sup> day of June 2013.



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18           MIRANDA M. DU  
19           UNITED STATES DISTRICT JUDGE  
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